STATE OF MICHIGAN

COURT OF APPEALS

JAMES LITTLE, CHERYL LITTLE, STEVEN RAMSBY, MARY KAVANAUGH, STANLEY W. THOMAS, NANCY G. THOMAS, MICHAEL MCCLUSKY, and GLADYS MCCLUSKY,

Plaintiffs/Counter Defendants-Appellees,

v

BETTY H. HIRSCHMAN,

Defendant/Counter Plaintiff-Appellant,

and

GERALD W. CARRIER and SALLY ANN CARRIER,

Defendants-Counter Plaintiffs,

and

FRANCIS VANANTWERP, ELIZABETH VANANTWERP, JOHN P. VIAU, GENEVIEVE VIAU, MASON F. SHOUDER, and JEAN ANN SHOUDER,

Defendants.

UNPUBLISHED
March 22, 2007

No. 265086
Cheboygan Circuit Court
LC No. 98-006480-CH

Before: O'Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

In this property dispute regarding the dedication of parks and alleys in the Ye-qua-ga-mak subdivision in Cheboygan County, appellant appeals as of right from the trial court's order amending its initial judgment. The trial court's decision followed an order of remand from this Court concerning the scope of the dedication. *Little v Hirschman*, unpublished opinion of the

Court of Appeals, issued June 29, 2004 (Docket No. 227751) (*Little III*). We affirm in part, and reverse in part.

Appellant owns two adjoining waterfront lots, numbered 46 and 47, in the Ye-qua-ga-mak subdivision. Her property is bounded by Riverside Park on the east, Lakeside Park on the south, and an alley providing access to Lakeside Park on the west. The Cheboygan River flows along the east side of Riverside Park, and connects with Mullett Lake which is located to the south of Lakeside Park. The subdivision plat provides that the parks are "dedicated to the owners of the several lots." Appellees own lots along Riverside Park, but do not have frontage on Mullett Lake.

This case is before this Court for a third time. In our initial opinion, we held that the private dedication of land was not valid. *Little v Hirschman*, unpublished opinion of the Court of Appeals, issued April 19, 2002 (Docket No. 227751) (*Little I*). Our Supreme Court reversed and remanded the case back to this Court. *Little v Hirschman*, 469 Mich 553, 555-556; 667 NW2d 319 (2004) (*Little II*). In our opinion on remand, we noted "several apparent flaws in the trial court's analysis" and remanded this action to the trial court for further consideration of the proper extent of appellees' usage of the parks and alleys in the subdivision. *Little III*, *supra* at slip op pp 2-3.

On remand, the trial court ordered (1) that the alley between lots 47 and 48 be restricted to pedestrian passage, (2) that the parks "not be used by anyone other than adjoining property owners after the hours of 9:00 p.m. or before the hour of 9:00 a.m.[,]" (3) that fires, litter, and waste are prohibited in the parks, (4) and that dogs are prohibited from any sandy beach areas. The trial court further stated that the record supported a conclusion that appellant's lots were different from other lots in the subdivision based on topography, and noted that an early advertisement for the sale of lots on the subdivision referenced a bathing beach, which the court concluded was the area in front of appellant's lots. Thus, the court failed to amend its ruling permitting use of the sandy area in front of appellant's home as a group beach while limiting other portions of Lakeside Park to foot traffic and strolling.

Appellant argues that the trial court violated the law of the case doctrine when it continued to differentiate the beach in front of appellant's lots. Specifically, appellant asserts that the trial court erred by continuing to distinguish the beach area in front of her lots from the remainder of Lakeside Park despite this Court's previous admonition that no evidence had been presented that appellant's lot was unique. Whether the trial court violated the law of the case doctrine is a question of law reviewed de novo on appeal. *Cardinal Mooney High School v Michigan High School Athletics Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). This Court also reviews a trial court's holding in an equitable action de novo. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003). The trial court's findings of fact are reviewed for clear error. *Id.*

"Under the law of the case doctrine, 'if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same."' *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). The "appellate court's decision likewise binds lower tribunals because the

tribunal may not take action on remand that is inconsistent with the judgment of the appellate court." *Id*. at 260.

Here, this Court "[v]acated and remanded" this matter "for a full and accurate review of the facts in the proper legal light." *Little v Hirschman*, unpublished opinion of the Court of Appeals, issued June 29, 2004 (Docket No. 227751) (*Little III*), slip op p 3. An order vacating a prior decision and remanding for further consideration in light of the correct law does not establish the law of the case. *Hill v Ford Motor Co*, 183 Mich App 208, 212; 454 NW2d 125 (1989). Thus, the trial court did not violate the law of the case doctrine by continuing to differentiate the beach in front of appellant's lots.

The question remains, however, whether the trial court erred in its conclusion that the beach area in front of appellant's lots should be treated differently as far as its permissible use by appellees. In *Little II*, the Supreme Court found the language dedicating the Ye-qua-ga-mak parks to be legally indistinguishable from the dedication language found in *Thies v Holland*, 424 Mich 282, 286; 380 NW2d 463 (1985). *Little II*, *supra* at 563. Thus, this Court concluded that appellees are not littoral owners of Lakeside Park, and, therefore, they only have an easement to use the park. *Little III*, *supra* at slip op p 2.

To determine the rights of non-littoral owners, courts must first look to the language of the grant. *Dyball v Lennox*, 260 Mich App 698, 703-704; 680 NW2d 522 (2004). Courts should consider the circumstances existing at the time of the grant to determine the scope of the dedication only if the language of the grant is ambiguous. *Id.* at 704. The language of the grant at issue indicates that appellees have the right to use Lakeside Park as a park. An area set aside for a lakeside park is reasonably understood as an area set aside for recreation including picnicking, swimming, fishing, sunbathing, and strolling. These are the activities the trial court concluded could be undertaken on the beach in front of appellant's lots by appellees. Appellees' usage of the park is subject to the limitation that their use not unreasonably interfere with the use and enjoyment of the area by the adjacent littoral property owners such as appellant. *Thies*, *supra* at 289, 293-294. Thus, the court properly limited hours of access, pets, campfires, and litter. In light of these restrictions, we conclude that the court did not err by concluding that the activities permitted on the beach in front of appellant's home would not unreasonably interfere with her reasonable use and enjoyment of the area. See *Dobie v Morrison*, 227 Mich App 536, 541-542; 575 NW2d 817 (1998).

However, instead of applying this same analysis throughout Lakeside Park, the trial court reached the conclusion that these activities would only be permitted in front of appellant's lots. We reject this differentiation because there is no ambiguity in the dedication that could permit the court to consider additional facts. Notably, the plat itself does not distinguish between the area in front of appellant's lots and the remainder of Lakeside Park. Nor is it clear, as this Court noted in *Little III*, that the area in front of appellant's lots is especially unique in its topography as photographic evidence shows the sandy area extending west of appellant's lots. Therefore, we hold that the uses found by the trial court to be permissible in front of appellant's lots are to be also allowed in the remainder of Lakeside Park.

Appellees argue that use of Lakeside Park to the west of appellant's lots should not be expanded by this Court beyond strolling and foot traffic because doing so could negatively impact property owners that are no longer parties to this suit. However, it is the plat dedication

that controls the outcome of this case, which all owners presumably had knowledge of when they purchased their parcels. Nor, in light of the limitations established by the trial court, is there reason to believe that engagement in picnicking, swimming, fishing, sunbathing, and strolling throughout Lakeside Park by non-littoral owners is likely to unreasonably interfere with the littoral owners' reasonable use and enjoyment of their property.

Accordingly, we reverse the trial court's order to the extent it did not allow the permissible uses in front of appellant's lots to also be allowed throughout the remainder of Lakeside Park. We affirm in all other respects. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Alton T. Davis